79-76

No._____



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

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HOLLIS O. BLACK, FOR HIMSELF, AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PETITIONERS

v.

WILLIAM E. PAYNE, EXECUTIVE OFFICER, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL.

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INDEX TO ATTACHED APPENDIX

Hollis O. Black
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

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APPENDIX 1

FILED

FEB 15 1979

Emil E. Melfi, Jr. CLERK
U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLIS O. BLACK, for himself and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants

vs.

WILLIAM E. PAYNE, Executive Officer, Public Employees' Retirement System, et al.,

Defendants-Appellees

No. 76-2906

OPINION

Appeal from the United States District Court for the Eastern District of California

Before: CHOY and SNEED, Circuit Judges and KERR*, District Judge.

CHOY, Circuit Judge:

Hollis O. Black appeals from the district court's dismissal of his suit

challenging the change in mandatory retirement age for certain California state employees. We affirm.

I. Statement of the Case

Appellant Black began working for the state of California on December 2, 1970. At that time, the mandatory retirement age applicable to Black was age 70. As a state worker, Black was enrolled in the state's pension program, the Public Employees' Retirement System (PERS), Cal. Gov't Code §20000.

In 1971, the California legislature enacted Senate Bill 249, stats. 1971, ch. 170, §38, p. 231. That bill amended Cal. Gov't Code §20981, lowering the mandatory retirement age for members of PERS

*The Honorable Ewing T. Kerr, Senior U.S. District Judge for the District of Wyoming, sitting by designation.



to 67 years. Pursuant to this amendment, Black was retired before reaching the age of 70.

Black filed a class action suit against varius persons connected with the operation of PERS. He claimed to represent all those persons who were members of PERS before the enactment of Senate Bill 249 and who at the time of its enactment and effective date were between the ages of 65 and 70. Black's complaint averred first that PERS distributed newsletters misstating the effects of the statutory changes for the purpose of inducing employees subject to the mandatory retirement provisions to apply for benefits and thereby waive all claims regarding the validity of the amendment. Black claimed that these actions violated the anti-fraud pro-

visions of the federal securities laws. Black alleged secondly that the change in mandatory retirement age violated the fourteenth amendment of the United States Constitution. Asserting a property right in continued state employment until age 70, Black claimed that Senate Bill 249 deprived him (and the class he purported to represent) of property without affording a hearing and other incidents of due process.

Black sought reinstatement and backpay for all employees retired pursuant to the amendment and adjustment of the pension benefits of those former employees to what they would have received had they continued to work until age 70. He also prayed for a permanent injunction requiring PERS to disclose all material facts regarding the statu-



tory amendments and prohibiting the state from requiring any employee to retire without affording a hearing.

Appellees, defendants below, filed a motion to dismiss for lack of subject matter jurisdiction. Black responded with a motion for summary judgment. The district court granted the motion to dismiss and denied appellant's motion for summary judgment. The district court held that Black's participation in PERS failed to satisfy the definition of "security" enunciated by the Supreme Court. The court also held that Black had no contract right of which Senate Bill 249 could have deprived him.[1/] After the district court rejected a motion for rehearing and new trial, Black filed the instant appeal.

II. Securities Law Claim

Black contends that his participation in PERS constituted an "investment contract" within the meaning of the federal securities laws and therefore he is entitled to the protection of those laws.[2] We disagree.

In International Brotherhood of Teamsters v. Daniel, 47 U.S.L.W. 4135 (U.S. Jan. 16, 1979), the Supreme Court determined that participation in a non-contributory, compulsory private pension plan did "not comport with the commonly held understanding of an investment contract," and thus did not implicate the federal securities laws. Id. at 4137. The Court found that the pension plan did not meet the definition of investment contract first enunciated in SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946), and reaffirmed in United Housing



Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975): "/T/he test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 47 U.S.L.W. 4136.[3]

Both this court and the Supreme Court have noted that while the Howey test has two components--the "investment of money" and an expectation of "profits to come solely from the efforts of others"--the latter is the more critical factor. The Supreme Court wrote in Daniel: "As we observed in Forman, the "'touchstone' of the Howey test 'is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepenurial or managerial efforts of others." Id. at 4137; see United

Sportfishers v. Buffo, No. 75-2475, ___ F. 2d ___, ___(9th Cir. Nov. 6, 1978), slip op. at 3601; Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 432 (9th Cir. 1978).

Although PERS is contributory, Cal. Gov't Code §§20600-20614, Black's participation therein does not involve a "reasonable expectation of profits" to be derived from the efforts of others. The California legislature's purpose in enacting PERS was not to provide an investment opportunity. See Cal. Gov't Code §20001; Quintana v. Board of Administration, 54 Cal. App. 3d 1018, 1021, 127 Cal.Rptr. 11, 13 (1976). Under state law participation in PERS is considered a part of the employee's compensation for service to the state. See Miller v. State, 18 Cal. 3d 808, 814-15,



557 P.2d 970, 973-74, 135 Cal.Rptr. 386, 389-90 (1977). Moreover, PERS benefits are determined by a statutory formula and not by the income or "profit" made by PERS. See Cal Gov't Code §20611. And as a non-profit operation, any income earned by PERS must either be credited to contributions or held in reserve against later deficiencies. Cal. Gov't Code §20203. Further, Black's participation in PERS was compulsory as an incident to his employment, Cal. Gov't Code §20014; he thus did not "choose" to participate because of a reasonable expectation of profit from the effort of others. Finally, as a state program PERS lacks the element of economic risk usually associated with investments. See United California Bank v. THC Financial Corp., 557 F.2d 1351,

1358-59 (9th Cir. 1977). Because the key factor indicating an investment--the reasonable expectation of entrepeneurial profits--is absent here, we conclude that Black's participation in PERS does not constitute an "investment contract" or "security" within the meaning of the federal securities laws.[4/]

III. Due Process Claim

Appellant argues next that the state has deprived him of "property" without a hearing and other elements of due process of law in contravention of the fourteenth amendment. He suggests that the change in retirement age breached a contractual obligation constituting "property."

In Bishop v. Wood, 426 U.S. 341 (1976), a discharged city employee contended that his due process rights had



been violated by his termination. He claimed, inter alia, that he had a property interest in continued employment. In rejecting that claim, the Supreme Court wrote:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

Id. at 334 (footnotes omitted); see Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The California Supreme Court has determined that under California law the change in mandatory retirement age did not implicate any property interest within the meaning of the due process clause. In Miller v. State, 18 Cal. 3d 808, 557 P.2d 970, 135 Cal.Rptr. 386 (1977), a former state employee

challenged the reduction in mandatory retirement age also challenged in this action. In response to the contention that the modification in age violated the due process clauses of the federal and state constitutions, the California Supreme Court held that

> plaintiff has no vested contract right to remain in public employment beyond the age of retirement established by the Legislature. Upon being required by law to retire at age 67 rather than age 70, plaintiff suffered no impairment of vested pension rights since he had no constitutionally protected right to remain in employment until he had earned a larger pension at age 70.

Id. at 818, 557 P. 2d at 976, 135 Cal. Rptr. at 392. Since state law is determinative of the existence of a property interest in employment, Miller compels the conclusion that the change in mandatory retirement age did not



implicate any constitutionally protected right in life, liberty, or property. Accordingly, we affirm the dismissal of the due process claim.[5/]

IV. Leave to Amend

Appellant argues lastly that the judgment below should be reversed and the cause remanded to the district court to allow him to amend his complaint to state a claim under 18 U.S.C. §§371, 1341, the criminal mail fraud statutes.[6/] He asked for leave to amend his complaint for the first time in his reply brief; he made no such request in the district court. Appellant notes that leave to amend should be freely given when justice so requires. Fed.R.Civ.P. 15(a).

In Jackson v. American Bar Association, 538 F.2d 829 (9th Cir. 1976),

plaintiffs filed a complaint alleging unconstitutional discrimination. Defendants filed motions to dismiss. The district court granted defendants' motions on the ground, inter alia, that plaintiffs had not stated a claim upon which relief could be granted. After agreeing that plaintiffs had not properly stated a claim, we wrote:

> /A/ppellants complain that they were not permitted to amend their complaint and urge that such an option be tendered now. The reason urged is that since the case was decided below on a motion to dismiss, the plaintiffs should have been allowed to amend under Fed.R.Civ.P. 15(a). But where a motion to dismiss is supported by affidavits on both sides, it becomes a speaking motion and is treated as a motion for summary judgment. /Citations omitted./ Furthermore, the record does not disclose any effort to amend. Under the circumstances here, the request to remand with instructions to permit amendment comes too late.

Id. at 833.



In the present case as in Jackson, both parties filed papers other than the pleadings regarding defendants' motion to dismiss; the district court did not exclude those papers in reaching its result. Accordingly, here plaintiff specifically moved for summary judgment. Therefore, the judgment in the present case must properly be considered a motion granting summary judgment in favor of defendants. Fed.R.C.P. 12(b); Jackson, 538 F.2d at 833; Schnepp v. Hocker, 429 F.2d 1096, 1098 n. 1 (9th Cir. 1970); Potrero Hill Community Action Committee v. Housing Authority, 410 F.2d 974, 974 (9th Cir. 1969). As in Jackson, here there was no effort to amend the complaint prior to this appeal. We thus follow Jackson in affirming the judgment of the district court.

AFFIRMED.

Footnotes

1. (Reference on page 5)

Although the district court denominated its decision a dismissal for lack of subject matter jurisdiction, we believe that more properly the judgment is based upon a failure to state a claim. See Fed.R.Civ.P. 12(b)(6). The district court's memorandum indicates that it addressed the merits of whether appellant had established the prerequisites for each of its claims: viz., the requirements of a "security" as a condition to coverage by the federal securities laws and the requirement of a deprivation of life, liberty, or property as a condition for assertion of a viable due process claim. As the Supreme Court has written:

> Jurisdiction, therefore, is not defeated . . .by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for judgment on the merits and not for dismissal for want of jurisdiction. . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.



Bell v. Hood, 327 U.S. 678, 682-83 (1946). There is no claim here that Black's allegations were frivolous or made solely to obtain federal jurisdiction.

Of course, since federal jurisdiction was premised on a federal question, the failure to state a claim meant that there was no question properly before the court, and, a fortiori, no federal question. But as this court has written:

> /W/hen a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous.

Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 602 (9th Cir. 1976); see Int'l Bhd. of Teamsters v. Daniel, 47 U.S.L.W. 4135,4136,4140 (U.S. Jan. 16, 1979; Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d

426, 430 (9th Cir. 1978).

The district court's judgment confirms this reading of its decision. The district court wrote:

> It is Ordered and Adjudged judgment is hereby entered for the Defendants and against the Plaintiff.

Had the district court meant only to dismiss for lack of subject matter jurisdiction, such a judgment on the merits would be inappropriate. See Jones v. Brush, 143 F. 2d 733, 735 (9th Cir. 1944). We thus conclude that the district court determined that Black had failed to state a claim under Rule 12(b)(6).

After the Timberline Lumber Co. court determined that the judgment there was for failure to state a claim and not for lack of subject matter jurisdiction, it next concluded that because the district court had papers before it beyond the pleadings, there was in fact a "speaking motion" subject to Rule 56. 549 F.2d at 602. We reach the same conclusion here. See part IV infra.

2. (Reference on page 6)

In Int'l Bhd. of Teamsters v. Daniel, 47 U.S.L.W. 4135 (U.S. Jan. 16, 1979), the Supreme Court reaffirmed that "/t/he definition of a 'security'/in the Securities Act of 1933 and Securities Exchange Act of 1934/is virtually identical and, for the purposes of this case, the coverage of the two Acts may be regarded as the same." Id. at 4126 n. 7.



3. (reference on page 7)

After concluding that the Teamster's pension plan did not satisfy either component of the Howey test, the Court noted two other factors. First, neither Congress nor the SEC had indicated prior to the Daniel suit, that noncontributory, compulsory pension plans should be considered securities. 47 U.S.L.W. at 4139. Although the Court was discussing the noncontributory scheme before it, and although PERS involves employee as well as employer contributions, see Cal. Gov't Code §§20603, 20741, the Court's conclusion appears equally applicable to the instant case. See Daniel, 47 U.S. L.W. at 4139 n. 21. Moreover, Black has not presented any evidence to the contrary to either this court or the district court.

The Court also noted that passage of a federal statute specifically designed to protect employees' interests in pension plans "undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans." Id. at 4139; see Employee Retirement Income Security Program, 29 U.S.C. §1001 et seq. While "government plans" are exempted from the coverage of this law, 29 U.S.C. §1003(b)(1),

we believe the extensive state regulation and control of PERS also constitutes a formidable factor mitigating against extending the federal securities laws to cover PERS. See United Sportfishers v. Buffo, No. 75-2475, ___ F.2d _____, _____ (9th Cir. Nov. 6, 1978), slip op. at 3602 n. 3.

4. (reference on page 10)

Because of our conclusion supra, we need not determine if Black's participation in PERS might satisfy the "investment of money" component of the Howey test.

5. (reference on page 13)

Appellant claims that the district court improperly held that the absence of an "investment contract" within the meaning of the federal securities laws meant that appellant did not have any contractual rights to continued employment and corollary pension benefits. Appellant argues that even if there no investment contract for federal securities law purposes, he might still have some contractual rights. As noted supra, however, Miller established that the change in retirement age did not implicate any contract or property interests of appellant within the meaning of the due process clause. Therefore, appellant cannot state a due process claim. We thus affirm the rejection of the due process claim, albeit on a rationale different from the district



court's. See United States v. Crain, No. 76-1574, _____ F.2d ____, ____ (9th Cir. Jan. , 1979), slip op. at n. 9 and cases cited therein.

6. (reference on page 13)

Given our resolution infra, we do not consider whether or not criminal statutes afford a private right of action.

APPENDIX 2

FILED

APR 16 1979

Emil E. Melfi, Jr.
Clerk, U.S.Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| HOLLIS O. BLACK, for himself, and on behalf of a class of persons similarly situated,<br><br>Plaintiffs-Appellants<br><br>vs.<br><br>WILLIAM E. PAYNE, Executive Officer, Public Employees' Retirement System, et al.,<br><br>Defendants-Appellees | No. 76-2906<br><br>ORDER |

Before: CHOY AND SNEED, Circuit Judges, and KERR,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.



The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*The Honorable Ewing T. Kerr, Senior U. S. District Judge for the District of Wyoming, sitting by designation.

APPENDIX 3

FILED JUL 3 1975

Clerk, U.S.District Court
Eastern District of California

By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| HOLLIS O. BLACK, for himself, and on behalf of a class of persons similarly situated,<br><br>Plaintiffs<br><br>vs,<br><br>WILLIAM E. PAYNE, Executive Officer, Public Employees' Retirement System, et al.,<br><br>Defendants | Civil No. S-74-23 |

MEMORANDUM

This action arises out of California Government Code Section 20981, as amended by Stat. 1971, c. 170, p. 231, §38. The amended statute lowered the



compulsory retirement age from 70 to 67 years for, inter alia, all members of the California Public Employees Retirement System (hereinafter PERS). The instant complaint alleges that the defendants' administration of the above-stated change in PERS violated certain federal securities statutes and regulations. More specifically, the named plaintiff claims that PERS, its executive officer William E. Payne, and its Board of Administrators used instrumentalities of interstate commerce to effect a scheme or device to defraud the named plaintiff, and others similarly situated, in the purchase of securities.

The named plaintiff claims to represent a class of persons who were members of PERS and were over 65 but not 70 years old on July 21, 1971, the ef-

fective date of the amendment to California Government Code Section 20981. He contends that a membership in PERS is an "investment contract" within the meaning of the Securities Acts, the sale or purchase of which is controlled by federal law. He further contends that the application for retirement benefits sent to the plaintiffs just prior to their reaching the amended compulsory retirement age was part of the defendants' fraudulent scheme to induce the plaintiffs to exchange their more valuable pre-amendment rights for the less valuable rights provided by the amendment to Section 20981. The applications for retirement benefits did not, according to the named plaintiff, give full and fair disclosure of the above-described "exchange" of rights effected



by the filing of that application. In addition, the named plaintiff claims that the defendants' actions deprived him and the other plaintiffs of contractual rights under the "investment contract" without due process of law in violation of the Fourteenth Amendment to the United States Constitution. The court's jurisdiction is invoked under Title 15 U.S.C. Sections 78aa and 77 v(a), which provide district courts with jurisdiction in actions where a violation of the federal securities laws has been alleged.

The defendants, while denying the substance of the named plaintiff's allegations, have motioned to dismiss this action for lack of subject matter jurisdiction, pursuant to FRCivP 12(b)(1). The named plaintiff has moved the court

to grant summary judgment in favor of the class he allegedly represents, pursuant to FRCivP 56.

The court will focus first on the defendants' motion to dismiss for lack of subject matter jurisdiction. They maintain that membership in PERS is not an "investment contract" within the definitional sections of the Securities Acts. In addition, the defendants moved to dismiss on sovereign immunity grounds. The Supreme Court's recent decision in United Housing Foundation, Inc. v. Forman ___U.S.___, 43 U.S.L.W. 4742 (June 16, 1975) (hereinafter Forman), makes it clear that participation in PERS by a California state employee is not an "investment contract" within the meaning of the Securities Acts and that the court must therefore grant the



defendants' motion to dismiss.

In Forman, supra, the Court stated that the "touchstone" of the test for distinguishing an "investment contract" from other commercial dealings

> "is the presence of an investment in a common venture premised on a reasonable expectation of profits derived from the entreprenurial or managerial efforts of others." Id. at 4747.

Such "profits" are of two (2) types:

> "/1/ capital appreciation resulting from the development of the initial investment . . . or /2/ a participation in earnings resulting from the use of investors funds. . . ." Id. at 4747.

The Court then concluded that an"investment contract" exists only where the investor is attracted solely by the prospects of a return.

In the instant case no desire for profit motivated the named plaintiff's membership in PERS. PERS was not

created by the state legislature to make a profit, but rather

> "to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." California Government Code §20001 (West 1963).

In addition, any income earned by PERS must either be credited to contributions or held in reserve against deficiencies in interest in other years. California Government Code §20203 (West 1963). The plaintiff became a member of PERS by virtue of his status as a "miscellaneous" state employee, and not out of a desire to make a profit. California Government Code §20611 (West 1963).

The court must therefore dismiss



the plaintiff's Securities Acts claim, since the fundamental nonprofit nature of PERS is an insurmountable barrier to jurisdiction of the federal court. Forman, supra. The court must also dismiss the plaintiff's Fourteenth Amendment claim due to its finding that no "investment contract" exists between PERS and the named plaintiff upon which a claim of denial of contractual rights without due process of law could be based. Furthermore, in view of the court's disposition of this case it need not reach the sovereign immunity issue raised in the defendants' motion to dismiss. Forman, supra at 4745 n. 10.

For the reasons stated above the court HEREBY GRANTS the defendants' motion to dismiss, and denies the named plaintiff's motion for summary judgment.

IT IS SO ORDERED.

DATED: July 9, 1975.

/s/ Thomas J. MacBride
UNITED STATES DISTRICT JUDGE



APPENDIX 4

Judgment On Decision
By The Court Civ 32 7-63

FILED

JUL 9 1975

Clerk, U.S.District Court
Eastern District of California

By_____

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF CALIFORNIA

Civil Action File No.
S-74-23 TJM

HOLLIS O. BLACK, for himself, and on behalf of a class of persons similarly situated,
vs.
WILLIAM E. PAYNE, Executive Officer, Public Employees Retirement System. et al.,

31
JUDGMENT

This action came on for (~~trial~~) XXXXX (hearing) before the Court, Honorable THOMAS J. MacBRIDE, United States District Judge, presiding, and the issues having been duly (XXXXX) (heard) and a

decision having been rendered, July 9, 1975.

It is Ordered and Adjudged Judgment is hereby entered for the Defendants and against the Plaintiff.

Dated at Sacramento, California, this 9th day of July, 1975.

ENTERED

JUL 9 1975

Clerk, U.S.District Court
Eastern District of California

By_____
Deputy Clerk

JAMES R. GRINDSTAFF
Clerk of Court

By:/s/ S. J. Ferguson
S. J. Ferguson
Deputy Clerk